

STATE OF MICHIGAN
COURT OF APPEALS

REX WILLIS and SHERYL WILLIS,

Plaintiffs-Appellees,

v

BRYANT CUSTOM HOMES, INC. and IAN
BRYANT,

Defendants-Appellants.

UNPUBLISHED
September 12, 2006

No. 260498
Grand Traverse Circuit Court
LC No. 04-024035-CZ

IAN BRYANT and BRYANT CUSTOM HOMES,
INC.,

Plaintiffs-Appellants,

v

REX WILLIS and SHERYL WILLIS,

Defendants-Appellees.

No. 260519
Grand Traverse Circuit Court
LC No. 04-024052-CK

Before: Sawyer, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment enforcing an arbitration award in favor of plaintiffs.¹ We affirm.

This case arose when plaintiffs complained of some serious and several minor problems with a house that defendant constructed for them. When plaintiffs found defendant's efforts to

¹ Rex and Sheryl Willis first filed a complaint to enforce an arbitration award, so they are referred to as "plaintiffs." Bryant Custom Homes, Inc., will be referred to as "defendant" because the trial court dismissed Ian Bryant, the president of the company, from this case. We refer to Ian Bryant as "Bryant."

remedy the issues unsatisfactory, they filed a complaint with Consumer and Industry Services and also pursued arbitration according to the contract. The CIS complaint acknowledged that plaintiffs did not want mediation because they were pursuing arbitration and further explained that they had already filed a claim with the American Arbitration Association. Through Bryant, defendant declined to participate in arbitration and directed the arbitrator and plaintiffs to send all further correspondence to defendant's attorney. Defendant did not participate in the AAA hearing, and the arbitrator awarded plaintiffs over \$74,000 in damages. Plaintiff filed a request for entry of the arbitration award, and defendant immediately filed a separate action to have the award declared void. The trial court consolidated the actions, entered judgment on the arbitrator's award, and granted plaintiffs' motion for attorney fees and costs.

Defendant first contends that it was denied due process because it did not have notice of the arbitration hearing. We disagree. We review de novo an arbitrator's jurisdiction and a trial court's decision to enforce, vacate, or modify an arbitration award. *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003). In this case, defendant had direct notice of the arbitration proceedings, but designated its attorney as the sole recipient of any further notice of proceedings. This comports with our general court rules regarding service of notices and other papers, MCR 2.107(B)(1), so the trial court did not err when it found that defendant received proper notice and due process.

The fact that the attorney withdrew his appearance is of little import, because defendant specifically designated the attorney as the individual to whom all notices should be sent. After failing to make any further contact with plaintiffs and the arbitrator, defendant may not now complain that its agent failed to keep it apprised of the arbitration proceedings. See *Carrier Creek Drain Drainage Dist v Land One, LLC*, 269 Mich App 324, 331; 712 NW2d 168 (2005). Moreover, given defendant's flat refusal to submit to arbitration, any argument that lack of notice prejudiced it is specious and inconsistent with the statutory framework allowing arbitration to proceed without it. See MCL 600.5011. Therefore, the trial court did not err when it rejected this argument.

Next, defendant contends plaintiffs waived their right to arbitrate because they filed a complaint with CIS contemporaneously with filing their demand for arbitration with the AAA. We disagree. "We review de novo the question of law whether the relevant circumstances establish a waiver of the right to arbitration" *Madison Dist Pub Schools v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001). "[W]aiver of a contractual right to arbitration is not favored. A party arguing there has been a waiver of this right bears a heavy burden of proof. The party must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the right to arbitrate, and prejudice resulting from the inconsistent acts." *Salesin v State Farm Fire & Cas Co*, 229 Mich App 346, 356; 581 NW2d 781 (1998), quoting *Burns v Olde Discount Corp*, 212 Mich App 576, 582; 538 NW2d 686 (1995) (citations omitted in *Salesin*).

Generally, actions that indicate a waiver of a right to arbitrate involve active participation in litigation, contradicting the party's alleged desire to avoid the court system. *Madison Dist Pub Schools*, *supra* at 589. In this case, plaintiffs did not initiate a lawsuit in circuit court, but instead initiated an administrative proceeding that could affect defendant's contractor's license. They expressly informed CIS that they were also filing a demand for arbitration with the AAA. According to MCL 339.2411(5)(e), if the contractual alternative dispute resolution would have

resolved the matter within ninety days, defendant could have postponed the administration's action against him until it was completed. Instead, defendant failed to comply with the procedure or decision, so the administrative action progressed. Because the statutory framework permitted plaintiffs to take administrative action against defendant's license while seeking monetary compensation from statutory arbitration, *id.*, plaintiffs did not waive their right to arbitration by filing their complaint with CIS.

Finally, defendant contends the trial court erred in awarding plaintiffs attorney fees. We disagree. "The decision whether to award attorney fees is within the trial court's discretion and will be reviewed on appeal for an abuse of discretion." *Schoensee v Bennett*, 228 Mich App 305, 314-315; 577 NW2d 915 (1998). "Contractual provisions for payment of reasonable attorney fees are judicially enforceable." *Central Transport, Inc v Fruehauf Corp*, 139 Mich App 536, 548; 362 NW2d 823 (1984). In this case, the contract stated that in any legal action arising out of the agreement, the prevailing party was entitled to reasonable attorney fees and costs. Defendant contends, however, that plaintiffs are not entitled to attorney fees because they did not allege attorney fees as an element of damages in their complaint. MCR 2.112(I). However, plaintiffs requested attorney fees in their response to defendant's complaint for declaratory relief, which was the gravamen of the dispute, so plaintiffs properly pleaded their request for attorney fees. MCR 2.110(A). Defendant also contends that the trial court should not have included an award of attorney fees because the arbitration award did not include them. This argument is disingenuous because the attorney fees at issue were incurred in defending the arbitrator's award. The arbitrator could not award fees that had not been earned. Accordingly, the trial court did not abuse its discretion in awarding attorney fees to plaintiffs after defendant's legal efforts to avoid the arbitration award failed.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell